breach or violation of this policy will lead to disciplinary action up to and including termination.'" *Ibid.*

Finally, the Board concluded that petitioner's discipline of employees for discussing the tips policy was itself unlawful because it was based on the invalid tips rule. Pet. App. 23-24 n.3. The Board explained that, "where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule." *Ibid.* (relying on *Opryland Hotel*, 323 N.L.R.B. 723, 728 (1997)).

Concurring in part and dissenting in part, Chairman Battista stated that, in his view, when the record clearly establishes that the discipline imposed was for conduct that an employer lawfully can proscribe, and the employer makes clear to the employees that their discipline is for that conduct, he would not find the discipline unlawful. Pet. App. 38.[4] On the record in this case, however, he concluded that it was not clear that the employees were disciplined for discussions that occurred on the gambling floor; rather, the record indicates that they were disciplined for their discussion of tips and not on the basis of where the discussion occurred. *Ibid.*

4. The court of appeals enforced the Board's order and denied petitioner's petition for review. Pet. App. 1-

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[4] Chairman Battista's views are in accord with views that have been expressed by other former Board members. See *Saia Motor Freight Line*, 333 N.L.R.B. 784, 785-786 (2001) (Member Hurtgen, concurring); *Miller's Discount Dep't Stores*, 198 N.L.R.B. 281, 283 (1972) (Chairman Miller, dissenting), enforced on other grounds, 496 F.2d 484 (6th Cir. 1974). The Board, by contrast, permits an employer to escape liability for disciplining employees pursuant to an unlawful rule only when the employer can demonstrate interference with its business operations "and that this rather than violation of the rule was the reason for the discharge." *Id.* at 281.

21. The court agreed with the Board that the rules concerning customer service and discussion of the tips policy were invalid because they restricted employee discussion in places beyond the casino gambling floor and its adjacent aisles and corridors. *Id.* at 5-14.[5]

The court also upheld the Board's finding that petitioner had unlawfully disciplined employees for violating the invalid rule prohibiting discussions of the tips policy anywhere on company property. In so doing, the court rejected petitioner's contention that its disciplinary actions should be held lawful because it disciplined the employees for discussing tips in the casino gambling area, where petitioner could have prohibited such discussion under a valid rule. Pet. App. 15-17. Noting that it must uphold the Board's interpretation if it is "a reasonable one," the court concluded that the Board's "rule that all disciplinary actions imposed pursuant to an unlawful rule are unlawful" was a "reasonable" interpretation of the NLRA. *Id.* at 16. As the court explained, "[t]he Board has previously recognized the need to protect employees from rules that have a chilling effect on the exercise of their rights," and that the Board's rule "reduces the chilling effect that results from [the] imposition of overbroad rules." *Id.* at 16, 17 (citing *Lafayette Park Hotel*, 326 N.L.R.B. at 825; *NLRB* v. *Vanguard Tours, Inc.*, 981 F.2d 62, 67 (2d Cir. 1992)). The court also noted that "[t]he situation under consideration is analogous to [] constitutional overbreadth challenge[s]," which "[c]ourts permit * * * because they facilitate the striking down of laws which have a chilling effect on per-

[5] The court, however, modified the cease-and-desist provision of the Board's order to limit the order to the areas outside of the gambling floor and the adjacent aisles and corridors. Pet. App. 13-14.

sons whose actions may not be lawfully proscribed." *Id.* at 16.

The court of appeals upheld the Board's finding that petitioner's confidential-information rule was unlawful because it expressly prohibited employees from discussing wages and other terms and conditions of employment. Pet. App. 18-21. The court agreed with the framework set forth in *Lafayette Park Hotel*, 326 N.L.R.B. at 825, to balance the interest of employers in maintaining confidentiality rules and the rights of employees under Section 7 to discuss their terms of employment. While recognizing employers' legitimate interest in maintaining the confidentiality of private information, the court reasoned that employers could not prohibit employees from discussing their wages or working conditions. Pet. App. 19. The court concluded that "confidential information cannot be defined so broadly as to include working conditions." *Id.* at 20. The court thus held that petitioner's "definition of 'confidential information' clearly violates Section 8(a)(1) because it expressly includes 'salary information[,] . . . salary grade[, and] . . . types of pay increases.'" *Ibid.* (alterations in original).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. This Court's review is therefore not warranted.

1. Petitioner challenges (Pet. 16-24) the court of appeals' conclusion that petitioner unlawfully disciplined employees for violating its invalid rule prohibiting employees from discussing the tips policy anywhere on petitioner's property. While conceding that its rule was

overbroad and invalid (Pet. 17 & n.3), petitioner argues that its disciplinary actions should be found lawful because the disciplined employees discussed the tips policy on the casino floor, a location where petitioner could by rule validly prohibit such discussions. It is by no means clear, however, that petitioner could prevail under such a theory on the facts of this case. Chairman Battista determined in his concurring opinion that, even applying a policy under which "not * * * *all* discipline imposed pursuant to an overbroad rule is necessarily unlawful," the disciplinary action imposed in this case nonetheless was unlawful. He reasoned that the record showed that petitioner's discipline of the employees "was based on their discussion of tips and not on the locus where the discussion occurred." Pet. App. 38.

In any event, petitioner's claim does not warrant review. Specifically, petitioner claims that the court of appeals' decision (i) was based on a constitutional overbreadth doctrine that was improperly applied to NLRA jurisprudence, and (ii) conflicts with this Court's decision in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), and with Section 10(c) of the NLRA, 29 U.S.C. 160(c). Those contentions lack merit and do not warrant review.

a. Petitioner's assertion that the court of appeals' decision was based on a "constitutional overbreadth" doctrine misapprehends the court's opinion. In upholding the Board's conclusion that petitioner's disciplinary actions violated the NLRA, the court of appeals principally relied on law developed under the NLRA rather than on constitutional overbreadth principles. Pet. App. 14-17. The court explained that, "[b]y adopting the rule that all disciplinary actions imposed pursuant to an unlawful rule are unlawful, the Board reduces the chilling

effect that results from imposition of overbroad rules." *Id.* at 16.[6] The court also cited Board decisions that "recognized the need to protect employees from rules that have a chilling effect on the exercise of their rights," and the court concluded that "the Board's interpretation is reasonable." *Id.* at 16, 17 (citing *Lafayette Park Hotel*, 326 N.L.R.B. at 825; *Vanguard Tours*, 981 F.2d at 67). The court therefore held, in agreement with other courts of appeals, that the Board acted reasonably in concluding that "a disciplinary action for violating an unlawful rule is itself a violation of the NLRA." *Id.* at 17; see *NLRB* v. *McCullough Envtl. Servs., Inc.*, 5 F.3d 923, 931 n.9 (5th Cir. 1993); *NLRB* v. *Lummus Indus., Inc.*, 679 F.2d 229, 232, 233 & n.6 (11th Cir. 1982).[7] Although the court of appeals added the observation that "[t]he situation under consideration is *analogous* to a constitutional over-breadth challenge," Pet. App. 16 (emphasis added), the court did not, as petitioner asserts (Pet. 17), base its holding "on a novel and unwarranted importing of a constitutional overbreadth doctrine as a new element of NLRA jurisprudence."

b. Petitioner also argues that the decision of the court of appeals is inconsistent with *Transportation Management*, which upheld, as a permissible construction of the NLRA, the Board's burden-shifting approach in cases in which the employer asserts both unlawful and

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[6] The Board cited *Opryland Hotel*, 323 N.L.R.B. at 728, and *Saia Motor Freight Line*, 333 N.L.R.B. 784 (2001). Pet. App. 23-24 n.3.

[7] Although petitioner argues (Pet. 18) that those decisions do not present the exact situation presented here, the decisions support the general principle approved by the court of appeals in this case, and petitioner does not suggest that the decisions conflict with the court of appeals' decision below.

lawful motives for a discharge or other adverse employment action.[8] Petitioner argues that the court of appeals' decision conflicts with *Transportation Management* because it denied petitioner the right to assert the affirmative defense that it disciplined employees for a lawful reason. Petitioner further claims that the decision conflicts with Section 10(c) of the NLRA, 29 U.S.C. 160(c), which provides that the Board shall not require reinstatement or backpay if an individual was suspended or discharged for cause.

Because petitioner failed to raise those arguments before the Board, including in a motion for reconsideration, the NLRA prevents the Court from considering those arguments in the first instance. See 29 U.S.C. 160(e) ("No objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982) (bar against judicial review under 29 U.S.C. 160(e) applies when party fails to preserve objection to Board's decision by filing motion for reconsideration with the Board); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (same). Petitioner could have raised those issues to the Board in a motion for reconsideration of

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[8] Under that approach, the Board's General Counsel must first show that union activity was a motivating factor in an employer's decision to "discharge or [engage in] other adverse action" against a statutory employee. *Transportation Mgmt.*, 462 U.S. at 401. Once that showing is made, the employer can avoid liability by demonstrating as an affirmative defense that it would have made the same decision in the absence of any protected activity. *Id.* at 401-402.

the Board's conclusion that, "where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule." Pet. App. 24 n.3. Petitioner also failed to raise those arguments in the court of appeals. This Court typically does not consider claims that were neither raised nor decided below, see *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984), and there is no reason to depart from that customary practice here.

In any event, petitioner's claim of a conflict with *Transportation Management* is without basis. Petitioner argues that, because it could have maintained a rule barring discussion on the casino floor, it therefore could discharge employees for that activity even in the absence of a valid rule. The Board has long held, however, that where, as here, an employer disciplines employees pursuant to an overbroad rule, proof that the employer would have disciplined the employee for a lawful reason requires proof that the employee interfered with the employer's business operations "and that this rather than violation of the rule was the reason for the discharge." *Miller's Discount Dep't Stores*, 198 N.L.R.B. 281, 281 (1972), enforced on other grounds, 496 F.2d 484 (6th Cir. 1974). That rule, which preceded *Transportation Management*, is not inconsistent with that decision, and it reasonably takes account of the danger that, absent such proof, the discipline would be understood in the workplace as enforcement of the overbroad rule (which, as Chairman Battista noted, is how the discipline was understood in this case, Pet. App. 38-39).

Petitioner made no claim that the particular employee discussions leading to the discipline actually in-

terfered with its casino floor operations. Indeed, in the court of appeals, petitioner argued that the discipline was lawful because its rule prohibiting discussion of tips was limited to the casino floor. As petitioner acknowledges (Pet. 17 n.3), the court rejected that factual contention, and petitioner does not challenge that rejection. Accordingly, having failed to make a particularized showing that the employees' discussion interfered with its casino floor operations and that such interference, rather than its unlawful rule, was the actual reason for the discipline, petitioner has failed to establish that the employees were discharged for cause within the meaning of Section 10(c). In those circumstances, the analysis approved by this Court in *Transportation Management* for situations in which discipline is based on both unlawful and lawful reasons is inapplicable. See *Saia Motor Freight Line*, 333 N.L.R.B. 784 (2001) (discipline for violating unlawful, overly broad rule itself constitutes violation of Section 8(a)(3), without consideration of dual-motivation analysis under *Transportation Management*); see also *Lummus Indus.*, 679 F.2d at 232, 233 n.6 (same).

2. Contrary to petitioner's argument (Pet. 25-30), the court of appeals' holding that petitioner's maintenance of its confidential-information rule was unlawful does not conflict with the decisions of other courts of appeals. In the cases relied on by petitioner, the courts upheld differently worded confidential-information rules but did not disagree on the applicable legal standard. Because those decisions, like this one, turn on the particular facts, there is no warrant for this Court's review.

In evaluating rules proscribing discussion of information, the Board determines whether maintenance of the rule "would reasonably tend to chill employees in the

exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 N.L.R.B. at 825; accord *Brockton Hosp.* v. *NLRB*, 294 F.3d 100, 106-107 (D.C. Cir. 2002), cert. denied, 537 U.S. 1105 (2003). In making that determination, the Board considers whether "employees could reasonably believe that the rule prohibits discussions among employees concerning wages, benefits, and other terms and conditions of employment." *Lafayette Park Hotel*, 326 N.L.R.B. at 826; accord *Brockton Hosp.*, 294 F.3d at 106-107. As the court of appeals explained below, the Board's test recognizes both the need of employees "to discuss their terms of employment" and the "substantial and legitimate interest" of employers "in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information." Pet. App. 19.

Under that test, the Board has upheld confidentiality rules that restrict disclosure of business information and do not explicitly refer to information concerning "employees," because those rules reasonably protect the employers' interest in maintaining the confidentiality of its proprietary information and "employees * * * reasonably would understand" that such rules are "designed to protect that interest rather than to prohibit the discussion of their wages." *Lafayette Park Hotel*, 326 N.L.R.B. at 826 (rule prohibiting divulging of "Hotel-private information"); see *Super K-Mart*, 330 N.L.R.B. 263, 263 (1999) (restricting disclosure of "Company business and documents"). On the other hand, the Board has invalidated those confidentiality rules that expressly prohibit employees from revealing information about "employees" and that define information about employee wages and working conditions as confidential. *E.g.*,

Brockton Hosp., 294 F.3d at 106-107 (affirming Board's invalidation of rule that provided that information concerning "associates [*i.e.*, employees] * * * should not be discussed either inside or outside the hospital, except strictly in connection with hospital business," because employees could believe that rule restricted their right to discuss wages and working conditions); *IRIS U.S.A., Inc.*, 336 N.L.R.B. 1013 (2001) (invalidating rule stating that information about employees is strictly confidential and cannot be disclosed to anyone, including other employees).

The court of appeals correctly applied those principles in upholding the Board's finding that petitioner's confidential-information rule was unlawful. As the court stated, petitioner's policy restricted employees from communicating information considered "confidential," a term that was explicitly defined to include information concerning salary, grievances and complaints, discipline, and other terms and conditions of employment. See Pet. App. 18-21. The court observed that, in conjunction with petitioner's rule prohibiting employees from communicating "confidential information," employees could reasonably conclude that discussion of salary information was proscribed. *Id.* at 20.

In the cases relied on by petitioner (Pet. 26-28), the courts, on different facts, determined that the specific language of the confidentiality rules at issue would not reasonably tend to chill employees' exercise of their right to discuss wages and terms and conditions of employment with other employees or with union officials. In *Community Hospitals* v. *NLRB*, 335 F.3d 1079 (D.C. Cir. 2003), the rule at issue—which restricted the "[r]elease or disclosure of confidential information concerning patients or employees," *id.* at 1088—did not ex-

pressly define confidential information to include information about salary and working conditions. The court concluded that a reasonable employee would not believe that the rule would bar an employee from discussing his or her wages and working conditions. *Id.* at 1089. Petitioner's policy, unlike the rule at issue in *Community Hospitals*, explicitly encompassed salary information and information about grievances and discipline. In addition, because the policy in *Community Hospitals* expressly treated "confidential information concerning * * * employees" on a par with "confidential information concerning *patients*," *id.* at 1088 (emphasis added), the court concluded that a reasonable employee would not interpret the rule to prohibit discussion of his or her *own* wages or employment conditions, *id.* at 1089.

In *NLRB* v. *Certified Grocers of Illinois, Inc.*, 806 F.2d 744 (7th Cir. 1986), a company official, replying to an employee's question about how the union had obtained her address, stated that an employee's name and address were confidential and that the leak could only have come from petitioner's payroll, personnel, or data-processing departments. The court found that the official's statement "could only have been understood to mean * * * that it was against company policy for workers to disclose information to which they had access by virtue of their employment in the payroll, personnel, or data-processing departments," and not to implicate employees' rights under Section 7 to discuss their wages and other terms and conditions of employment. *Id.* at 747.[9]

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[9] *NLRB* v. *Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990), on which petitioner relies (Pet. 28), is wholly inapposite. There, the Fifth Circuit summarily affirmed the Board's uncontested finding that the employer had unlawfully "promulgated a workplace rule that forbade

Petitioner contends (Pet. 29 & n.6) that its rule applied only to "information obtained through the course of employment," and that no employee would read the rule to limit discussion of his or her own working conditions. Petitioner made the same argument below in challenging the Board's fact-finding in this case. That challenge was correctly rejected by the court of appeals, and it does not warrant further consideration by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951) ("Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals."). In any event, petitioner's rule expressly defined confidential information in terms of working conditions, and the rule stated that its examples of confidential information were "not all-inclusive." Pet. App. 18. In addition, petitioner distributed the rule to all employees by placing it in the employee handbook under the general information section, along with other rules that unlawfully restricted employee communication and discussion at the workplace. See pp. 4-5 and note 3, *supra*. In those circumstances, the rule was susceptible to a broad reading that "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 N.L.R.B. at 825.

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the discussion of confidential wage information between employees." 919 F.2d at 363. The quotation relied upon by petitioner—that Section 7 "does not extend to the unauthorized dissemination of information obtained from an employer's confidential files or records," *ibid.*—referred not to construing the employer's confidentiality rule, but instead to the legality of the employer's discharge of an employee who had stolen evaluations of co-workers and a list of wage increases from his supervisor's desk and had shared that information with others.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2005

No. 05-477

In The

Supreme Court of the United States

DOUBLE EAGLE HOTEL & CASINO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The present case allows this Court to address two important issues: 1) whether *all* discipline imposed pursuant to an overbroad rule is necessarily and conclusively unlawful; and 2) whether an employer is precluded from requiring those employees who have access to the salary and pay information of other employees to keep that information confidential.

In its Opposition Brief ("Opp. Brief"), the National Labor Relations Board ("NLRB" or "Board") asserts that certain arguments raised in Double Eagle's Petition were not argued before the Board and that Section 10(e) of the National Labor Relations Act ("NLRA" or "the Act") precludes this Court's full consideration of certain aspects of the first issue. It is understandable that the Board would seek to divert this Court from a full review of the Tenth Circuit opinion – particularly its conflict with Section 10(c) of the Act. The issue which the Board seeks to keep from this Court's review, however, was at the heart of the arguments and analysis both at the Board and the Tenth Circuit as explained in Section I.C. of this Reply. For the reasons set forth in Double Eagle's Petition and herein, the Court should review the opinion of the Tenth Circuit to resolve a long-standing conflict and to provide clear guidance to employers and to the NLRB on these important issues.

I. This Case Presents An Important Issue That Needs To Be Resolved By This Court.

A. The NLRB has for many years been divided on the issue of whether *all* discipline imposed pursuant to an overbroad rule is necessarily and conclusively unlawful.

A review of the cases cited at page 7 of the NLRB's Opposition Brief, in footnote 4, confirms that, for nearly thirty-five years, the members of the NLRB have been divided on the issue of whether all discipline imposed pursuant to an unlawful rule is conclusively unlawful. In *Daylin, Inc., Discount Division d/b/a Miller's Discount Department Stores* ("*Miller's Discount*"), 198 N.L.R.B. 281 (1972), the employer had adopted an

overbroad rule that it applied in a discriminatory manner to prohibit union solicitation. Two employees were discharged for union solicitation during work time. The majority of the Board found the discharge to be unlawful and held that an overbroad rule can provide no justification for the discharge of an employee who violated it. Chairman Miller filed a dissenting opinion in which he compellingly explained his opposition to the majority's action:

> I have concluded that in assessing the lawfulness or unlawfulness of employer imposed discipline in any case, we must focus upon: (1) whether, on the facts of the case, the discipline interfered with the legitimate exercise of Section 7 rights and therefore violated Section 8(a)(1); (2) whether the discipline discriminated against an employee so as "to encourage or discourage membership in any labor organization"; and (3) whether, under Section 10(c) of the Act, we are forbidden to order reinstatement because the individual was "suspended or discharged for cause."
>
> Thus, if an employee is disciplined for engaging in conduct which an employer may lawfully prohibit – i.e., utilizing work time for engaging in nonproductive activity, whatever its nature, including the use of such working time for union activity – it would seem that there is no per se interference with employee rights under Section 8(a)(1). Nor would such discipline constitute 8(a)(3) discrimination unless it were shown that the employee who utilized such working time for union activity was treated more harshly than other employees apprehended while engaging in a like, but not union-connected, prohibited use of working time. Further, if there is no such interference or discrimination shown and we order an employee reinstated, I fear we have run afoul of Section 10(c) in that we have ordered reinstated an employee who was discharged for conduct which an employer may lawfully, and did, prohibit.

Id. at 283.

Twenty-nine years later, in *Saia Motor Freight Line, Inc.* ("*Saia*"), 333 N.L.R.B. 784 (2001), the Board again addressed a

case in which an employer had established an overly broad no-solicitation/no-distribution rule. The panel's majority expressly found that it was unnecessary to engage in a *Wright Line* analysis in finding that a disciplinary warning for violation of the overbroad rule violates the Act. It specifically held that "any disciplinary action taken pursuant to an unlawful no-solicitation rule is likewise unlawful. . . ." *Id.* at 784-785. Member Hurtgen filed a concurring opinion in which he adopted the dissenting opinion of Chairman Miller in the *Miller's Discount* case:

> I do not agree that disciplinary action which is imposed pursuant to an unlawful rule is necessarily unlawful.[FN 1] For example, if an employer has a rule that is unlawfully broad (e.g., solicitation is banned at all times), that rule would not necessarily render unlawful the application of the rule to warn an employee to stop soliciting during work time.
>
> FN 1. See the dissenting opinion in *Miller's Discount Department Stores, 198 N.L.R.B. 281, 283 (1972).*

Id. at 785-786.

That ongoing division among NLRB members is again apparent in this case. In response to the majority decision of the three-member panel, Chairman Battista filed an opinion concurring in part and dissenting in part, in which he reiterated and continued the long-standing division among NLRB members on this issue:

> [C]onsistent with former member Hurtgen's concurring position in *Saia Motor Freight Line*, 333 N.L.R.B. 784, 785-786 (2001), I would not find that *all* discipline imposed pursuant to an overbroad rule is necessarily unlawful.

(Appendix, page 38). Thus, the issue that has been percolating for nearly thirty-five years, dividing the members of the NLRB, has once again emerged in this case.

B. This case has broad implications in the field of labor/employment relations.

If the holding of the Tenth Circuit in this case is not reversed, it will stand for the proposition that, where an employer has adopted an overbroad rule, any discipline

that may fall within the scope of that overbroad rule, whether it would otherwise have been lawful or not, is deemed conclusively unlawful, without even considering whether the discipline was for cause.

An employer's right to discipline or discharge employees for misconduct is an established and important prerogative that is fundamental to an employer's ability to establish an orderly workplace and run a business effectively. This Court has repeatedly recognized an employer's right to discipline employees for legitimate reasons and has held that this right remains intact even if the employer was motivated in part by illegal reasons. *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393, 394-395, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983) ("employers retain the right to discharge workers for any number of other reasons" and "the employer may assert legitimate motives for his decision"); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 284-287, 97 S.Ct. 568, 574-576, 50 L.Ed.2d 471 (1977) (if a lawful reason alone would have sufficed to justify the discipline, the employee cannot prevail in a claim against the employer). The employer's right to discipline employees for legitimate reasons impacts the availability of remedies to an employee for unlawful discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249-250, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (citing 29 U.S.C. § 160(c) as an example of the general principle that a court cannot order affirmative relief for an employee if the employer would have made the same decision for legitimate reasons); *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995) (remedies available to employees are limited by the employer's prerogative to discipline employees for lawful reasons); see, also, 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (1991) (even where action by an employer is found to be unlawful and an injunction warranted, if the employer would have taken the same action in the absence of the impermissible motivating factor, remedies of backpay and reinstatement are precluded).

The fundamental employer rights referenced above were incorporated by Congress into the NLRA. Section 10(c) expressly limits the Board's authority to impose a remedy of

reinstatement or backpay for any individual who was suspended or discharged for cause. Under the Tenth Circuit's ruling in this case, that clear Congressional mandate and limitation on Board authority is simply ignored, as is any *Wright Line* analysis, in cases in which an employer's rule has been found to be overbroad.

Finally, the opinion rendered by the Sixth Circuit Court of Appeals in *Miller's Discount* identifies another important implication of the Tenth Circuit's holding in this case. The Sixth Circuit noted that the Board's majority opinion in *Miller's Discount* takes the point of view that where a no-solicitation rule goes beyond permissible limits, that rule can provide no justification for the discharge of an employee who violated it, unless the employer can establish that the solicitation interfered with the employee's own work or that of other employees and that the interference, rather than violation of the rule, was the reason for the discharge. The Court then noted:

> This, of course, would have the effect of shifting the burden of proof as to the challenged discharges from the general counsel to the respondent. To assess the validity of the Board's theory it would be necessary to decide the question whether a no-solicitation rule that is overbroad on its face may, nevertheless be validly enforced against persons engaging in unprotected activity. Because we hold that the no-solicitation rule here was enforced in a discriminatory fashion, and that decision suffices to sustain the Board's remedial order, we need not decide, and we expressly reserve judgment on, this question.

N.L.R.B. v. Daylin, Inc., Discount Division, 496 F.2d 484, 489, n. 3 (6th Cir. 1974). The issue not decided by the Sixth Circuit was presented squarely to and was decided by the Tenth Circuit in this case. Its decision has far reaching implications in the entire field of labor/employment relations.

C. This issue has been at the heart of this case from the start and Rule 10(e) does not preclude this Court's consideration of the issue.

In an effort to avoid review by this Court of the serious implications of the Tenth Circuit's holding, the NLRB asserts at page 12 of its Opposition Brief that this Court is prevented from considering certain arguments because they were not raised before the Board. Double Eagle has consistently asserted before the Board and the Tenth Circuit its right to discipline employees for conduct which it could lawfully proscribe. That the issue was adequately raised at the Board level is apparent from the fact that Chairman Battista, concurring in part and dissenting in part, stated: "I would not find that *all* discipline imposed pursuant to an overbroad rule is necessarily unlawful," citing Member Hurtgen's concurring position in *Saia*. (Appendix, p. 38). Member Hurtgen's concurring position in *Saia*, as discussed in Section I.A. above, relied on and incorporated the dissenting opinion in *Miller's Discount*. That opinion, which is cited at some length in Section I.A. above, fully sets forth the fundamental dispute on this issue. To suggest that this dispute, which has been percolating among Board members for over three decades, had somehow escaped the attention of the Board in this case is simply wrong. The Board majority, in footnote 3 of its decision, expressly acknowledged the contrary view, rejected the principles that have been asserted by the dissenting Board members over the years, and affirmed the rule that, "where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule." (Appendix, pp. 23-24). Double Eagle has consistently asserted at every level of these proceedings that its tips discussion policy, as applied to the conduct of the three employees, was a lawful rule and that their discipline was lawful. Double Eagle obviously raised the issue sufficiently to have it expressly addressed by both the Board's majority and dissenting members.

Even if Section 10(e) could otherwise have had any application in this case, it is inapplicable to the Section

10(c) issue because the Board has, in ignoring the limitation of Section 10(c), "patently traveled outside the orbit of its authority." *See, e.g., N.L.R.B. v. Annapolis Emergency Hospital*, 561 F.2d 524, 528 (4th Cir. 1977).

II. The Tenth Circuit Opinion In This Case Affirms NLRB Action Which Violates Section 10(c), Is Beyond Its Authority And Eviscerates Long-standing Employer Rights.

A. In ignoring the express prohibition of Section 10(c), the Board acted outside of the scope of its authority in this case.

The clear, direct and mandatory language of Section 10(c) of the NLRA imposes a limitation on the authority of the Board:

> No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

The opinion of the Tenth Circuit makes two points perfectly clear: 1) "The disciplinary actions were taken based on discussion of the tip-splitting policy on the casino floor" (Appendix, page 15); and 2) "The Respondent lawfully [can] prohibit employees from . . . discussing their working conditions in the casino's gambling area, and adjacent aisles and corridors frequented by customers. . . ." (Appendix, pp. 13-14). The Tenth Circuit reaches the obvious conclusion from these two points: "Therefore, all three employees were disciplined for actions that they could have been disciplined for under a lawful tips rule." (Appendix, page 16). Those two points and that conclusion perfectly frame the Section 10(c) issue that has divided the Board in *Miller's Discount*, *Saia* and this case. The Tenth Circuit's opinion confirms that the three employees were suspended or discharged for cause.[1] Under those circumstances, the Board is simply

[1] The Board's statement in its Opposition Brief (p. 5) that these employees were disciplined "shortly after a union organizing campaign

(Continued on following page)

acting outside of its authority when it orders reinstatement and back pay for those individuals.[2]

B. The facts of this case not only clearly frame this issue, but also clearly demonstrate the danger of the Tenth Circuit's holding.

The Opposition Brief overstates the evidence when it repeatedly implies that there was a clear policy that tips could not be discussed anywhere on the premises. While it is true that the Tenth Circuit deferred to the Board's factual conclusion that the tips policy applied beyond the gaming floor, that conclusion was based on the thinnest of evidence. The record below demonstrates that all of the management witnesses who testified about the tips discussion policy testified that it only applied to the gaming

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began" is simply inaccurate. It is also entirely irrelevant because this is neither a retaliation case nor a discriminatory application case.

[2] At page 13 of its Opposition Brief, the NLRB asserts that Double Eagle failed to demonstrate that the "particular employee discussions leading to the discipline actually interfered with its casino floor operations." The NLRB cites only one case – *Miller's Discount* – to support the proposition that such evidence is required. The Board acknowledges that "[f]or casinos, the Board applies the same standards it has developed for retail stores," and that under those standards, there is business justification for enforcing rules against solicitation in selling areas and gaming floors. Opp. Brief, p. 2. There is no requirement to show actual disruption to support such rules or to support specific disciplinary actions against employees who violate such rules. *Bankers Club, Inc.*, 218 N.L.R.B. 22, 27 n. 11 (1975) ("The Board has long approved employer rules prohibiting all solicitation [in the selling areas of retail establishments] on the theory that such activity might tend to drive away customers."); *McDonald's of Palolo*, 205 N.L.R.B. 404, 408 (1973) (non-solicitation rule was valid because " . . . the Employer could reasonably anticipate that the exercise of their Section 7 rights by the employees would disrupt its business."). On appellate review of *Miller's Discount*, the Sixth Circuit explicitly refused to affirm the reasoning of the Board, which reasoning remains contrary to the great weight of authority. Even if proof of actual disruption were required, the record below demonstrates that Double Eagle's rule prohibiting discussions about tips on the gaming floor was based on experience with disruptions and customer complaints resulting from actual employee disputes over tips in front of customers on the gaming floor. Discussion of tips had already had a disruptive impact on customers and business at Double Eagle.